PRIVY COUNCIL.

P. C.* 1888 *November* 9 *and* 14, *and December* 1.

BHASBA RABIDAT SINGH (PLAINTIFF) *v.* INDAR KUNWAR AND OTHERS (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Oudh Estates' Act (I of 1869), *s.* 13, *sub-section* 1—*Meaning of "intestate" as there used—Written but unregistered authority to adopt—Registration Act (III of* 1877), *s.* 17—*Invalid agreement relating to the estate of the adopted son—Conditional adoption.*

The Oudh Estates' Act, 1869, requires the registration of the writing by which an authority to adopt is exercised; but not the registration of the authority, which is required by the Act to be in writing.

The Indian Registration Act III of 1877, which does require authorities to adopt to be registered, expressly excepts authorities conferred by will.

The word "intestate," in s. 13, sub-section 1, of the Oudh Estates' Act, 1869, means intestate as to the talukhdari estate; and the use of the word does not exclude from the exception in that sub-section a son adopted under an authority conferred by a talukhdar's unregistered will.

A talukhdar by his will authorized his senior widow to select and adopt a minor male child of his family to be the owner of the entire *riasat*. This power having been exercised, the following objections to the adoption were disallowed: 1*st*, one founded on the will not having been registered, and consequently, the authority not having been registered. 2*ndly*, one founded on the erroneous argument that the adopted son was not within the class excepted in s. 13, sub-section 1, and therefore could not take under an unregistered will.

The adoption was also questioned on the ground that the widow had agreed, with the natural father of the adopted son, that she should retain the whole estate during her life. *Held*, that this had not rendered the adoption conditional, and that it did not affect the rights of the adopted son. Even if it had amounted to a condition, the analogy, such as it was, presented by the equities relating to powers of appointment under English law, suggested that the condition itself would have been void, without invalidating the adoption.

APPEAL from a decree (27th March 1886) of the Judicial Commissioner, affirming a decree (19th May 1885) of the District Judge of Faizabad.

The suit out of which this appeal arose was brought to obtain a declaration of the plaintiff's title as heir to the talukhdari and

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR R. COUCH AND MR. STEPHEN WOULLFE FLANAGAN.

other estate of the late Maharaja Sir Digbijai Singh, K. C. S. I., talukhdar of Bulrampur in Oudh, should the plaintiff survive the widows of the deceased; also, a declaration that the adoption by the late Maharaja's senior widow, the Maharani Indar Kunwar, the first defendant, whereby she had purported, under an authority from her husband in his will, to adopt Udit Narain Singh, a minor sued as under her guardianship, was invalid. The junior widow, the Maharani Jaipal Kunwar, was also made a party defendant.

The late Maharaja died on 27th May 1882, having made a will dated 15th March 1878. He left no issue; but conferred an authority to adopt upon the elder of his two widows. That he did so was decided in the appeal *Indar Kunwar* v. *Jaipal Kunwar* (1). To that suit the present plaintiff was not a party.

The will appears in the judgment of their Lordships on that appeal.

The relationship of the parties was as follows :—

BHAIYA FATEH SINGH.

Anup Singh.	Pahar Singh.
Kakolat Singh.	Tejan Singh.
Nawal Singh.	Bakht Bali Singh.
Arjun Singh.	(By adoption.) Rabidat Singh. (The plaintiff.)
Sir Digbijai Singh, K. C. S. I. (The last male talukhdar.)	

The elder widow adopted Udit Narain Singh on the 8th November 1883.

A deed of adoption, dated 15th December 1883, executed in the presence of witnesses, and reciting that she had, in accordance with the written permission of her deceased husband, adopted on Kahk Sudi, 8th Sambat 1940, corresponding to the 8th November 1883, Udit Narain Singh, minor son of Guman Singh, with due ceremonies, was registered on 5th December 1883.

At that time Guman Singh, the father, had signed an agreement in which, after stating that he gave his son to be adopted, he added :—

"The Maharani Sahiba shall have full control during her lifetime over him, and also over the property, moveable and immoveable, left by the

(1) L. R., 15 I. A., 127; I. L. R., 15 Calc., 725.

1888

BHASBA RABIDAT SINGH v. INDAR KUNWAR.

Maharaja now in heaven, and she will be at liberty to punish him, and, if need be, to eject him and adopt in his place some one else from the family of the Maharaja Saheb."

This was dated the 26th October 1883. Afterwards, the Maharani executed and registered another document, dated 28th March 1884, in which she stated the adoption made, adding:

"I further state by this writing that I made this adoption on the express condition and understanding that the said will, executed in my favour, would subsist and remain in force, and that after my demise, or at the time of my death, the said Udit Narain Singh would succeed to the talukhdari estate, i.e., the immoveable property, which was formerly in the possession of my late husband, and which is now in my full proprietary possession."

After stating other particulars, the Maharani declared the deed, dated 5th December 1883, to be null and void, and this document, of 28th March 1884, to be "a *sanad*."

The District Judge upheld the adoption. He was of opinion that the document executed as his will by the late Maharaja operated, though unregistered, in favour of the Maharani, his widow, because she was one of the class of those persons contemplated in s. 22, Act 1 of 1869. He held to be untenable the argument that Udit Narain having been one of those persons who could not have come in under s. 13 sub-section 1, the document required registration within one month of its execution in order to operate in his favour, and not having been registered, could not be rendered available for authorizing his adoption (1).

(1) Section 13 of the Oudh Estates' Act I of 1869 enacts:—

"No talukhdar or grantee, and no heir or legatee of a talukhdar or grantee shall have power to give or bequeath his estate or any portion thereof, or any interest therein, to any person not being either (1) a person who, under the provisions of this Act, or under the ordinary law to which persons of the donor's or testator's tribe and religion are subject, would have succeeded to such estate, or to a portion thereof, or to an interest therein, if such talukhdar or grantee, heir or legatee, had died intestate; or (2) a younger son of the talukhdar or grantee, heir or legatee, in case the name of such talukhdar or grantee appears in the third or the fifth of the lists mentioned in s. 8, except by an instrument of gift or a will executed and attested not less than three months before the death of the donor, or testator, in manner herein provided in the case of a gift or will, as the case may be, and registered within one month from the date of its execution."

An appeal from this judgment was dismissed. The Judicial Commissioner held that a son, adopted as Udit Narain had been, under an authority on a will, did not take as a devisee or a donee, but as an heir. "It must be recollected, "said the judgment," that the adopted son, as such, takes by inheritance not by devise. See *Bhoobun Moyee Debia* v. *Ramkishore Acharj Chowdhry* (1)". The Indian Registration Act (III of 1877), s. 17, was referred to. As regards the effect of the agreement between the widow and Guman Singh, the terms signed by the latter, at any rate the latter part, he held to be illegal. The adoption, however, had, as an act completed, taken place before the documents, signed and registered by the widow, were made. The judgment continued thus:—

"An adoption once made is by Hindu law indefeasible, and after the adoption of Udit Narain Singh, the Maharani's power of adoption was, during Udit Narain Singh's lifetime, exhausted (West and Bühler, 3rd Edition, Volume II, page 1152, and Mayne's Hindu Law and Usage, s. 101). There remains the agreement that the Maharani shall, during her lifetime, have full power over the Maharaja's estate. As regards this agreement I observe that the learned Counsel for the appellant has admitted that the adoption ceremonies were duly performed, and in those ceremonies there is no place for a condition of this kind, and I am not prepared to admit that a condition of the kind can invalidate the adoption; and that, following the analogy of the Full Bench ruling of the Allahabad High Court in *Hanuman Tewari* v. *Chirai* (2), I am of opinion that in any case it must be held that *factum valet*. It is doubtful whether the agreement would bind the son when he comes of age. *Ramasami Aiyan* v. *Venkata Ramaiyan* (3).

After referring to the English law relating to the subject of powers under deeds of settlement, the Judicial Commissioner concluded as follows:—

"Nor am I able to find in the agreement anything repugnant to the terms of the Maharaja's will. It appears to me to have been the Maharaja's intention that till such time as Government should undertake the management of his property his widows should hold it. I can find no fraud upon the power or the will in the matter of the adoption of Udit Narain Singh."

On this appeal, Mr. *J. H. W. Arathoon*, for the appellant, contended that the authority to adopt was invalid. The ordinary Hindu law was not that which regulated this adoption. The provisions of the Oudh Estates Act I of 1869 had superseded in

(1) 10 Moore's I. A., 279 (311). (2) I. L. R., 2 All, 164.
(3) L. R., 6 I. A., 196 (208); I. L. R., 2 Mad., 91.

1888

BHASBA RABIDAT SINGH v. INDAR KUNWAR.

regard to succession to a talukdari estate in virtue of adoption the ordinary law. To have fulfilled the requirements of the Act was essential; but there had not been a registration of the authority to adopt, nor of the will, which purported to contain it. He referred to the Law of Registration, as required both by the above Act and by the Indian Registration Acts VIII of 1871 and III of 1877. Again, a further objection was to be found in the fact of the boy whom the widow had purported to adopt not being within the line of succession upon intestacy recognised by the Act I of 1869. For the purpose of deciding this question, the Hindu law could not be invoked, and it could not be said that, because the boy was adopted, he was therefore within the meaning of the clause that he who takes by an unregistered will must be a person who would have succeeded upon an intestacy. As the son of Guman Singh he was outside the line of succession.

[LORD WATSON observed that without regarding the Hindu law as entirely regulating the succession, it might yet indicate to whom the estate would descend after the exercise of a power to adopt.]

The argument was that whatever the validity of the authority to adopt by Hindu law, still in regard to the special provisions of s. 13, sub-section 1, considering the distant connection of the boy's father with the testator, and the fact of the will not having been registered, the adoption was, as a result, unauthorized by the law governing the descent and devise of talukdari estates.

The strongest point against the validity of the adoption was, however, the fact that the widow, purporting to adopt under authority from her deceased husband, had entered into an agreement for her own benefit, with the father of the boy whom she purported to adopt. The terms of the agreement of 26th October 1883 indicated this; and not only in regard to the nature of the act of adoption by a Hindu widow, but in reference to the general rules of law on the subject of the execution of powers, the conduct of the widow must be held to have vitiated the alleged adoption. He referred to *Ramasami Aiyan* v. *Venkata Ramaiyan* (1), *Nilmoni Singh* v. *Bakranath Singh* (2), *Vallanki Vellata*

(1) L. R., 6 I. A., 196; I. L. R., 2 Mad., 91.
(2) L. R., 9 I. A., 104; I. L. R., 9 Calc., 187.

Krishna Rao v. *Venkata Rama Lakhsmi Narayan* (1), *Shoshinath Ghose* v. *Krishna Soondari Dasi* (2), *Duke of Portland* v. *Topham* (3), *Ganga Sahai* v. *Lekhraj Singh* (4), and to Farwell on Powers, Edition 1874.

Sir *Horace Davey, Q. C.*, and Mr. *R. V. Doyne*, with whom was Mr. *C. W. Arathoon*, for the respondents, were not called upon.

On a subsequent day (1st December) their Lordships' judgment was delivered by

LORD MACNAGHTEN.—It appears to their Lordships that this case is free from difficulty.

The will of the late Maharaja of Bulrampur, Sir Digbijai Singh, was recently under the consideration of this Board on the occasion of a claim by his junior widow to joint proprietary rights in his estate. Their Lordships then expressed their opinion that, according to the true construction of the will, the Maharaja conferred upon his senior widow (who is the first defendant in the present suit), and upon her alone, a life estate in all his property, and authority to select and adopt such minor male child of his family as she might think fit. The adoption which she was not only authorized but required to make was to be "according to the custom of the family and according to the Hindu law," and the adopted son was to "be in place of an actual son the owner of the entire *riasat*, and the assets moveable and immoveable," the widow taking a provision for her maintenance.

The senior widow selected for adoption a minor male child of the Maharaja's family. It has been admitted in this suit that "the ceremonies of adoption were duly performed." They took place on the 8th of November 1883. On the 5th of December following, the senior widow executed a deed of adoption, which was duly registered, by which she declared that, in accordance with the written permission of her deceased husband, she had

(1) L. R., 4 I. A., 1 ; I. L. R., 1 Mad., 174.
(2) L. R., 7 I. A., 250 ; I. L. R., 6 Calc., 381.
(3) 11 H. L. C., 32.
(4) I. L. R., 9 All., 256.

1888

BHASBA RABIDAT SINGH v. INDAR KUNWAR.

adopted Udit Narain Singh (who is the second defendant to this suit), and that he would be the proprietor of the Maharaja's estate and property, both moveable and immoveable, like a real son.

The appellant, who is a distant relative of the late Maharaja, and the person upon whom, according to the rules of intestate succession prescribed by the Oudh Estates' Act 1869, in default of any widow of the Maharaja, or any son adopted by her as provided by the Act, or any male lineal descendant of such son, the Maharaja's talukhdari estate would descend, brought this suit for the purpose of having it declared that the adoption of the second defendant was invalid fraudulent and void.

Three grounds of objection to the validity of the adoption were urged before their Lordships.

In the first place it was contended that the adoption was invalid, because the authority to adopt was not contained in a registered document. Their Lordships are of opinion that there is no ground for this contention. The Act of 1869 requires the writing by which an authority to adopt a son is exercised to be registered. It also requires the authority to be in writing. But it does not require that writing to be registered. Act III of 1877, s. 17, which does require authorities to adopt a son to be registered, expressly excepts authorities conferred by will.

In the next place, it was contended that the adoption was invalid, and the bequest to the adopted son of no effect, so far at any rate as regards the talukhdari property, because the adopted son was not a person who could take the talukhdari property under an unregistered will. It is obvious that this objection, assuming it to be well founded, would not better the position of the appellant if the senior widow had authority in writing to make the adoption, and did in fact make the adoption in the manner prescribed by the Act of 1869. The adopted son would not take until the widow's death, but still he would take to the exclusion of the appellant. Their Lordships, however, are of opinion that the objection is not well founded. In order to make the objection good, the appellant has to establish the proposition that the adopted son is not within the exception contained in s. 13, sub-section 1 of the Act, that he is not a person who, under the

provisions of the Act or under the ordinary law to which persons of the testator's tribe and religion are subject, would have succeeded to the talukhdari estate or to an interest therein if the Maharaja "had died intestate" The appellant endeavoured to support that proposition by arguing that if the Maharaja had left no will there would have been no authority to adopt in existence. And then, in regard to succession to the estate, Udit Narain Singh would have ranked as the son of Guman Singh. But the word "intestate" in sub-section 1 evidently means intestate as to his estate, that is, his estate as that expression is defined by the Act; the talukh or immoveable property to which alone the Act is declared to extend. This is plain on consideration of s. 13 taken by itself, but it is made still plainer, if possible, by reference to s. 22, which is closely connected with s. 13, and which expresses what otherwise would necessarily be implied, and qualifies the word "intestate" by the addition of the words "as to his estate."

The last point urged on behalf of the appellant was described by the learned Counsel who appeared in support of the appeal as his strongest point. It was this: The senior widow seems to have been unwilling to disregard her husband's injunctions, but at the same time, she was anxious to keep the estate during her life. She obtained from the natural father of the child whom she proposed to adopt a document, dated the 26th of October 1883, in which it was declared that she should have full control during her lifetime over the property left by the late Maharaja. It was not suggested that there was or could have been in the ceremonial of adoption any such condition or reservation, nor is any trace of that condition or reservation to be found in the deed of adoption of the 5th of December 1883. But some months afterwards, on the 28th of March 1884, the senior widow executed what is called a second deed of adoption, by which she purported to revoke the deed of the 5th of December, on the allegation that it ought to have contained a provision postponing the interest of the adopted son until her death.

On these facts it was argued that the adoption was a fraud upon the authority to adopt, and therefore void.

This point seems to their Lordships equally untenable.

1888

BHASBA RABIDAT SINGH v. INDAR KUNWAR.

The conduct of the senior widow is not altogether to be commended, but it would be extravagant to describe it as fraudulent, or to maintain that the adoption was made for a corrupt purpose, or for a purpose foreign to the real object for which the authority to adopt was conferred. It may be true, as suggested by Mr. Arathoon, that the child of Guman Singh was selected in preference to the child of the appellant because the senior widow had reason to believe that the selection would be less likely to lead to her position being challenged. But it is difficult to understand how a declaration by Guman Singh or an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which could only arise when his parental control and authority determined. The ceremonies of adoption are unimpeached. The deed of adoption is open to no objection. The second deed is admittedly inoperative. No conditions therefore were attached to the adoption. Had it been otherwise, the analogy, such as it is, presented by the doctrines of Courts of Equity in this country relating to the execution of powers of appointment to which Mr. Arathoon appealed would rather suggest that, even in that case, the adoption would have been valid and the condition void.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal. *Appeal dismissed.*

Solicitors for the appellant: Messrs. *Young, Jackson & Beard.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

P. C.* 1888 *November 7 & 9, December 1.*

BHUGWAN DAS (PLAINTIFF) *v.* THE NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA (DEFENDANTS).*

[On appeal from the Court of the Additional Recorder of Rangoon.]

Insurance—Marine Insurance—Open cover—Proposal to issue policy—Acceptance—Refusal to issue policy in terms of open cover.

An open cover to an amount stated for insurance on cargo to be shipped for a voyage in a ship (afterwards lost on that voyage) was given by the agent of the defendant company to the owner of the ship in order

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN and SIR R. COUCH.

1888

BHUGWAN DAS v. THE NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA.

that he might give it to the charterer, and it was a proposal to insure. The owner transferred the open cover to the plaintiff, who, under charter with him, shipped rice and applied for policies to the amount stated in the open cover. The defendants' agent then refused to issue any policy on the rice so shipped.

Held, that the open cover, as given to the owner, constituted a subsisting proposal to insure, and as soon as application for the policy under it was made to the defendant's agent by the shipper, to whom the open cover had been transferred, there was a binding contract that a policy should be issued in its terms. That the shipper asked for two policies did not, under the circumstances, prevent there being an acceptance, there having been a refusal to issue any policy.

APPEAL from a decree (23rd July 1886) of the Additional Recorder of Rangoon.

The suit out of which this appeal arose was brought by the appellant for the specific performances of a contract alleged to have been made by the respondents, through their agents to issue to the plaintiff a policy of insurance on cargo shipped from Rangoon to Calcutta, there having been a refusal to issue the policy, and the ship having been lost on the voyage.

The plaint, filed 18th August 1885, alleged that on the preceding 8th March, the plaintiff agreed with Mr. James Macrory of Rangoon for a charter from the latter as owner of the ship *Copeland Isle* from Rangoon to Bombay, the latter undertaking to obtain insurance for such goods as the plaintiff should ship by her; that the plaintiff required Macrory to obtain insurance for Rs. 15,000 upon 1,000 bags of rice which he intended to ship, and disbursements on account of the vessel; and that Macrory applied to the agents of the defendant company at Rangoon to take an insurance risk to that extent, which the agents agreed to do, and in due course issued an open cover for the same. This open cover Macrory endorsed and made over to the plaintiff, in accordance with custom, and the plaintiff thereupon executed a charter-party. He afterwards shipped 1,000 bags of rice on the *Copeland Isle*, and disbursed on her Rs. 4,000, writing on 31st March 1885 to the agents requesting them to declare policies of insurance on 1,000 bags of rice, value Rs. 10,000; also on the disbursement of the vessel from Rangoon to Bombay, Rs. 5,000; and enclosed the premium. The

1888

BHUGWAN DAS v. THE NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA.

plaint further alleged that the defendants refused to issue the policy; and lastly, the total loss of the *Copeland Isle*, and claimed specific performance.

The defendants by their answer denied that the open cover was given to Macrory as such, but alleged that it was given in answer to his question whether the Company was prepared to insure rice by that ship, and in order to be shown to other insurance agents as indicating that they considered the ship a fair risk. The form was not signed by the agents, nor registered by them in the Company's books, as it would have been had it been issued as a preliminary to granting a policy. They further alleged that the plaintiff was informed of the facts before the sailing of the ship; and that the open cover made no mention of disbursements: also that the indorsement and transfer took place without their knowledge, or notice to them; and they denied the alleged custom as to transfer of open covers: stating that Macrory had no insurable interest in the rice shipped, and that the Company was not liable for the amounts claimed.

Issues were fixed raising the principal questions whether the open cover was a contract which the plaintiff could claim to have specially performed; under what circumstances it was granted to Macrory; and whether it was transferable or assignable by him.

The Additional Recorder found that what took place at the issue of the open cover was the following:—

"Macrory wanting to get a charter for his ship applied to the plaintiff who entered into negotiations with him and approved of the terms of the proposed charter-party: the plaintiff, however, made one essential stipulation, before concluding the charter-party; and that was that Macrory should produce to him something to show that insurance risks would be taken by the insurance companies on the cargo shipped by the vessel. In order to satisfy this stipulation Macrory went to various insurance offices starting with the agents of the defendant Company, and obtained the document sued upon, and four other open covers, which he endorsed over to the plaintiff, who then executed the charter-party. What happened seems to have been done in pursuance of a practice which has been followed by other local shipowners like Mr. Macrory, who, according to the evidence of

Mr. Borland, apply to insurance agents here for open covers in order to be able to show them to persons whom they may ask to charter their vessels as a guarantee that cargo shipped by them will be insured."

The facts attending the plaintiff's application to Messrs. Gladstone, Wyllie & Co., as the defendants' Agents, to declare policies of insurance on the rice, and on disbursement, and their refusal, with the material part of the correspondence thereupon,—are set forth in their Lordships' judgment.

The Additional Recorder was of opinion that the contract to issue a policy had never been enforceable, by reason of Mr. Macrory's not having had any insurable interest in the rice shipped in the *Copeland Isle*. He had no doubt that the giving of the open cover might initiate a contract for insurance. But of that contract one of the most essential principles was that the assured should have at the time of the making of the contract an insurable interest in the subject-matter insured, and no such interest existed at the time. He was also of opinion that no custom in variation of this general principle, admitting the transferee who ultimately might become the shipper, to stand in the place of a person receiving the open cover, had been proved to prevail in Rangoon. Nor in his opinion did the relation of agency between the plaintiff and Macrory exist, it being the fact that at the time when Macrory was effecting the arrangements which he made with the insurance agents, it was uncertain whether the plaintiff would ship any rice on board the vessel. For these reasons he dismissed the suit with costs.

Mr. *J. Gorell Barnes, Q.C.*, and Mr *A. Agabeg*, for the appellant, argued that the judgment was incorrect in holding that the case turned on the absence of an insurable interest in Macrory at the time when he received the open cover. It had been settled for a century past that it was sufficient for the party assured to have an interest at the date of the contract. This the plaintiff had when he accepted the offer of insurance previously made in the open cover. The contention on his behalf was that he accepted the terms offered to any shipper who should ship under charter with Macrory, which terms, in effect, were those of the open cover. It was further contended for the appellant that

1888

BHUGWAN DAS v. THE NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA.

when he signed the charter-party, which he did upon the faith that he could have the policy referred to in the open cover, there was an adoption by the appellant of the terms, and thereupon a completed contract between him and the respondents who had offered those terms. The Court below had erred in holding that the evidence as to the mercantile usage regarding the issue of open covers was insufficient and in not holding that the plaintiff as principal was entitled to enforce the contract on which he sued.

They referred to Arnould on Insurance, 6th Edition, Part 10, Chapter III; *Sutherland* v. *Pratt* (1); *Irving* v. *Richardson* (2); *Routh* v. *Thompson* (3); *Fisher* v. *The Liverpool Maritime Insurance Company* (4); The Specific Relief Act, I of 1877, s 22; Fry on Specific Performance.

Mr. *A. Cohen, Q.C.*, and Mr. *R. G. Arbuthnot*, for the respondent Company, argued that the suit had been rightly dismissed. Macrory could not, by assigning the so-called open cover, confer greater rights on another than he had in himself; nor had the supposed custom, to issue open covers by the insurance agents to serve as an offer to any shipper subsequently coming forward to accept them, been proved to prevail in Rangoon. There were doubts how far such a custom would be enforceable. Again, it was argued that there was ground for the finding that there had been no relation of principal and agent between the appellant and Mr. Macrory in the obtaining the open cover; as to which it was open to doubt whether the document had been given as an open cover at all. Its effect might be considered to have been only that the Company regarded the shipment as a fair risk. Lastly, as to the acceptance, without which the case for the appellant must fail, to whom could it be said to have been addressed; and when was it complete. In regard to these points, the evidence did not enable the plaintiff to recover. They cited *Dickenson* v. *Dodds* (5), *Mackenzie* v. *Coulson* (6).

(1) 11 M. & W., 296.
(2) 1 Mood. and Rob., 153; 2 B. and Ad., 193.
(3) 11 East, 433; 13 East, 279.
(4) L. R., 8 Q. B., 469; L. R., 9 Q. B., 425.
(5) L. R., 2 Ch. D., 463.
(6) L. R., 8 Exch., 368.

Mr. *J. Gorell Barnes, Q.C.*, replied, arguing that there had been a complete acceptance by the plaintiff of a previous offer, made through and by means of the open cover, in which there was no necessity for persons to be named. He cited *Weidner* v. *Hoggett* (1), *Ionides* v. *Pacific Insurance Company* (2), *Great Northern Railway Company* v. *Witham* (3), *Morrison* v. *Universal Marine Insurance Company* (4), *Lishman* v. *Northern Maritime Insurance Company* (5).

Their Lordships' judgment was afterwards (1st December) delivered by

SIR R. COUCH—The appellant in this case brought a suit against the respondents, for specific performance of a contract of insurance. The Recorder of Rangoon, in whose Court it was brought, dismissed the suit with costs, and this appeal is from that judgment.

In March 1885, one John Macrory, a ship builder and owner of a vessel called the *Copeland Isle* then lying in Rangoon river, applied to the plaintiff, a merchant carrying on business at Rangoon, and also at Calcutta and Bombay, to charter that vessel. The evidence of the plaintiff, who was examined as a witness, was as follows:—

"I said to Macrory that if an open cover were given to me free of particular average, I would charter the vessel. When the charter-party was drawn and brought to me by Macrory and Sutherland (one of the brokers who arranged the charter) I said: 'Where is the open cover?' Then Mr. Macrory gave me this open cover, with these five others. When I got these the charter-party was signed by me. I shipped goods on the *Copeland Isle*. I shipped my own goods, 6,220 bags of rice. This is a copy of the charter-party. Subsequently I went to Messrs. Finlay Fleming, Messrs. Strang Steel, and Messrs. Gladstone Wyllie's, for policies on the covers. I got policies from all, except from Messrs. Gladstone Wyllie. I went to Gladstone Wyllie's

(1) L. R., 1 C. P. D., 533.
(2) L. R., 6 Q. B., 674.
(3) L. R., 9 C. P. D., 16.
(4 L. R., 8 Exch., 40.
(5) L. R., 8 C. P., 216; L. R., 10 C. P., 179.

1888

BHUGWAN DAS v. THE NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA.

and saw Mr. Bertram. I went three times to them before I wrote to them. Once I saw Mr. Bertram, and twice Mr. Gordon. I showed Bertram the open cover, and asked him for policies for Rs. 10,000 for 1,000 bags of rice, and Rs. 5,000 for disbursements. Mr. Bertram said: 'We have given a policy to a chetty.' That was, I believe, for Rs 17,500. I said: 'I have no concern with the chetty's policy. I want the policy for my goods.' Bertram said he would not give one. I then went to Gordon, who was the then Manager of Gladstone Wyllie's. Gordon said: 'I cannot give a policy, go to Mr. Macrory.' I went that day or the next day with Macrory to Gordon. Macrory asked Gordon to give the policy, as the ship was to be cleared. He spoke for a long time, and so did I. We both pressed Gordon to give one, but he said he would not. Then I said: 'If you do not give one I will send the customary notice.' Afterwards I addressed a letter to Gladstone Wyllie as the agents of the defendants' company."

The open cover was in these terms:—

"*Rangoon, 9th March* 1885.

"NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA.

"Dear Sir,

"We hereby consider you insured under an open cover to the extent of rupees fifteen thousand only, on rice per *Copeland Isle*, Captain——— ———, Rangoon to Bombay.

"Premium, 2 per cent.

"Free of war risks.

"Average f. p. a.

"Policy to be applied for before the ship sails, and vessel to be towed by steamer to sea.

"Yours faithfully,
"GLADSTONE WYLLIE & Co.,
"J. R. BERTRAM,
Agents in Rangoon.

"To R. MACRORY, ESQ."

(On the back:) "J. MACRORY."

The letter to Gladstone Wyllie as the defendants' agents above-mentioned was dated the 31st March 1885, and requested them

to declare policies of insurance on 1,000 bags of rice, value Rs. 10,000, and on disbursements of the vessel from Rangoon to Bombay Rs. 5,000, and it enclosed Government promissory notes for Rs. 300 for the premium. Gladstone Wyllie & Co. replied by letter, dated the 1st April 1885, saying: "As we did not grant you an open cover by the *Copeland Isle*, we regret we cannot issue a policy, and we return Rs. 300 in Government currency notes which you sent us." On the 1st April the plaintiff again wrote, stating that Macrory had transferred the open cover to him, and enclosing it with the Government notes, to which Gladstone Wyllie & Co. replied on the 2nd April that they could not recognize the transfer by Macrory of the open cover, and that they never entered into any engagement to grant the plaintiff a policy for Rs. 15,000.

Although the plaintiff at the interviews with Bertram and Gordon, and in his letter of the 31st March, asked for two policies, he appears not to have insisted upon having the insurance in that way, and the defendants' agents did not take the ground that the open cover did not bind them to give a separate policy for disbursements, but absolutely refused to issue any policy. Their Lordships think the defendants cannot say that the plaintiff was not willing to take a policy on rice for Rs. 15,000. Whether upon such a policy he could recover the disbursements or the Rs. 4,000 advanced on account of freight it is not now necessary to determine. In his plaint he has simply asked for a policy of insurance in terms of the open cover.

When the defendants' agents refused to issue a policy to the plaintiff, he endeavoured to obtain an insurance on the cargo uninsured from other offices in Rangoon and Bombay, but did not succeed. The *Copeland Isle* proceeded on her voyage to Bombay on or about the 1st April 1885, and was totally lost in a cyclone on the following 10th of June.

To return to the evidence. About the open cover, Macrory said (omitting passages which it is not necessary to read):—

"I remember this open cover. I got it for the charterer, Bhugwandas. I was to see if an insurance could be effected on the cargo before he would sign the charter-party. I made it over to Bhugwandas, and endorsed it. . . . I made all the

1888

BHUGWAN DAS v. THE NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA.

covers over to him on his signing the charter-party. . . . I saw Mr. Gordon when I first got this open cover. . . . I asked Mr. Gordon if he would take a risk, as I could get a charter if he would take a risk. I did not say that I only wanted it to show to other Companies, and not as an undertaking to issue a policy. . . . Mr. Bertram was present in Gordon's room when I had the conversation with Mr. Gordon, and immediately after I got the open cover . . . I went out of Gordon's room with Bertram. I got the open cover from Bertram in his room. I talked to Bertram there about the ship and the money I had expended on her, and the condition she was in. I said that if I could get an insurance I could effect a charter. I mentioned Bhugwandas as the charterer. . . . I asked Gordon whether he would insure a part of the cargo, or as much as he could take. When he said he could take up to Rs. 15,000, I asked for an open cover to that effect. I think the open cover was taken out of a book. I do not remember who put the stamp on."

Mr. Gordon was not examined as a witness, and there was a satisfactory explanation of this omission. Mr. Bertram was examined and said :—

"I am an assistant in the firm of Messrs. Gladstone Wyllie & Co., in Rangoon. The firm are the agents of the defendants' Company in Rangoon. I saw Macrory on the 9th March 1885 with reference to the vessel the *Copeland Isle*. He came to me personally at half-past two. . . . He asked me for a chit to show the other insurance offices that we were prepared to take insurance on the *Copeland Isle ;* of course that had reference to what had previously taken place when the matter was arranged by Mr. Gordon. . . . I heard Gordon tell Macrory that he would be willing to take a risk up to Rs. 15,000 on the vessel for the defendant Company. . . . At this second interview Macrory asked if we would give him a letter to show to Steel's and to Finlay's so that they could see that we were willing to take insurance on the vessel. I gave him a paper. This (the open cover) is the paper I gave. I used this form because he wanted something definite to show to people, mere word of mouth not being sufficient. I chose an open cover form because it was the most convenient thing we had, and it was much easier for me

to fill up this form than to write an open letter. . . . We said that we were prepared to accept a risk on the *Copeland Isle* to the extent of Rs. 15,000. Nothing was said about giving an open cover or a policy. Gordon said this. . . . We knew at the time Macrory had no rice to ship."

Mr. John Anderson, a witness for the plaintiff, whose firm are agents for several Marine Insurance Companies in Rangoon, said :—

"An open cover is issued generally before the shipment of the goods to be insured. After the goods are shipped the party producing the open cover gets a policy on payment of the premium. I do not know if we ever had a case of the kind, but our firm would issue a policy to the person producing the open cover to us, notwithstanding the open cover had been issued in another person's name." On cross-examination he spoke to the same effect.

Mr. John Borland, another witness for the plaintiff, whose firm at Rangoon also are agents for several Marine Insurance Companies, said: "If we issued an open cover to *A*, and afterwards *B* shipped the cargo, we should have no objection to issuing the policy to *B*." And on cross-examination: "I have many times issued an open cover to a man who has not an insurable interest. If Macrory came to us and told us he could not get a charter unless he got open covers on the cargo to be shipped, we would issue open covers to him, and look to him for the premium until we had intimation that the cargo had been shipped by some one else, and that the open cover was held by the shipper."

Upon the evidence in the suit their Lordships have come to the conclusion that the open cover was given to Macrory in order that he might give it to the charterer of the vessel, and that it was a proposal to insure. Although addressed to Macrory, it could not have been intended for his acceptance, as it was known that he was not going to ship the rice. When he handed it to Bhugwandas it was a subsisting proposal capable of being accepted by him, and when Bhugwandas went to Gladstone Wyllie's and showed Bertram the open cover, and asked him for policies, there was an acceptance of the proposal so as to make a binding contract with Bhugwandas to insure and issue a policy in terms

1888

BHUGWAN DAS v. THE NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA.

of the open cover. The asking for two policies did not prevent the acceptance being sufficient, as Bertram absolutely refused to give any policy.

The letter of the 1st April 1885, refusing to issue a policy, and of the 2nd April, refusing to recognize the transfer to Bhugwandas of the open cover, have been noticed. It is to be observed that neither in the interviews with Bhugwandas, nor in the letters, was it said that the paper given to Macrory was not intended to be an open cover. Indeed, in the letter of 2nd April it is so called. It was argued by the learned Counsel for the appellant that the contract became complete when the charter-party was signed, and the proposal to insure was acted upon. It is not necessary for their Lordships to give any opinion upon this contention, as they hold that the acceptance by Bhugwandas was made whilst the offer to insure was subsisting, and was sufficient to complete the contract. The plaintiff is entitled to specific performance, and their Lordships will humbly advise Her Majesty to reverse the decree of the Recorder's Court, and to make a decree that the defendants or their agents do make and issue a policy of insurance in terms of the open cover, and for the amount therein mentioned, and do pay the costs of the suit. The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Bramall & White.*

Solicitors for the respondents: Messrs. *Freshfield & Williams.*

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Wilson.

1889
March 18.

SOWDAMINI DASSI (PLAINTIFF) *v.* BROUGHTON AND OTHERS (DEFENDANTS).*

Hindu Law—Widow—Accumulations—Period up to which accumulations may be dealt with—Intention to accumulate.

Under the will of *N. C. M.* the testator left his estate to his brother provided that, within a term of eight years, no son should be born to such brother, capable of being adopted as a son of the testator, in accordance

* Appeal No. 1 of 1889, from the decision of Mr. Justice Trevelyan, dated 12th August 1887, in suits numbered 53, 64 and 141 of 1887.